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24 UNITED STATES DISTRICT COURT  
25 CENTRAL DISTRICT OF CALIFORNIA  
26 SOUTHERN DIVISION

27 IN RE: TOYOTA MOTOR CORP.  
28 UNINTENDED ACCELERATION  
MARKETING, SALES PRACTICES, AND  
PRODUCTS LIABILITY LITIGATION

Case No.: 8:10ML2151 JVS (FMOx)

**STATEMENT OF CO-LEAD  
COUNSEL FOR ECONOMIC  
LOSS PLAINTIFFS REGARDING  
THE EFFECT OF THE  
ECONOMIC LOSS MASTER  
COMPLAINT AND THE FIRST  
AMENDED CONSOLIDATED  
COMPLAINT**

This documents relates to:  
  
ALL ACTIONS

Date: Sept. 13, 2010  
Time: 3:00 p.m.  
Location: Courtroom 10C

1 Co-Lead Counsel for Economic Loss Plaintiffs respectfully submit this  
2 statement regarding the effect of the Economic Loss Master Consolidated  
3 Complaint (“MCC”) (Doc. 263) and the First Amended Consolidated Complaint  
4 (“Amended California Complaint”) (Doc. 264).

5 As we explain below, the MCC and Amended California Complaint perform  
6 distinct but complementary functions. The MCC is to govern motions directed at  
7 the pleadings and the merits, and the scope of discovery. The Amended California  
8 Complaint is to serve as the vehicle for class certification and trial because it relates  
9 to constituent actions over which this Court has both pretrial and trial jurisdiction.

10 **1. Purpose and Effect of the MCC**

11 **A. The MCC should be the sole operative pleading for purposes of**  
12 **motions to dismiss, summary judgment motions, and discovery.**

13 The MCC asserts claims that, in our judgment, should be pursued on behalf  
14 of the economic loss claimants because we believe they are meritorious and  
15 amenable to nationwide class action treatment. As the Court has observed, testing  
16 those claims “will be a critical milestone in terms of shaping this litigation.” Tr.,  
17 May 28, 2010, at 9:10–12. In that regard, subject to Court approval, plaintiffs  
18 intend for the MCC to be the only complaint defendants must respond to on  
19 September 13, and that all motions under F. R. Civ. P. 12 and 56 will be directed at  
20 the MCC. Rulings on such motions will apply to all underlying complaints in  
21 constituent actions to the extent they assert the same claims as the MCC.

22 The MCC will also be the sole pleading for determining the relevance of  
23 discovery in the economic loss class actions, thereby facilitating the management of  
24 the core discovery that is a primary objective of this MDL.

25 **B. The MCC should not merge all underlying class actions into a**  
26 **single consolidated action.**

27 Consolidation ““does not merge the suits into a single cause, or change the  
28 rights of the parties, or make those who are parties in one suit parties in another.””

1 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 561 (9th Cir. 1977) (quoting *Johnson v.*  
2 *Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1932)). Those long-recognized  
3 limitations on consolidation are especially important in the MDL context because  
4 an MDL transferee court lacks authority to assign a transferred case to itself for  
5 trial. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28  
6 (1998). As Judge Fallon has recognized, treating a consolidated complaint as if it  
7 fuses all constituent actions together implicates the rule of *Lexecon*:

8 If the master complaint in the present case were to be treated as a  
9 traditional complaint . . . it would complicate the matter of the  
10 subsequent remand of the individual MDL actions back to the  
11 transferor court by introducing confusion as to which court is the  
12 transferor court in light of the fact that two substantive complaints –  
13 one in [the transferee venue] and one in [transferor venue] – have  
14 been filed. Indeed, taking this to the extreme, a master complaint, if  
15 given the status of a traditional complaint, could be used to  
16 circumvent the remand requirement of 28 U.S.C. § 1407 by  
17 substituting itself for all individual actions filed in the MDL and  
18 thereby frustrate the intended effect of that statute as recognized in the  
19 Supreme Court’s decision in [*Lexecon*].

20 *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141 (E.D. La. 2002).

21 Accordingly, constituent actions in this MDL must retain their individual  
22 identities, notwithstanding the MCC.

23 **C. The filing of the MCC should not result in the dismissal of claims**  
24 **or defendants not asserted or named in the MCC.**

25 Toyota’s position appears to be that the MCC must, once and for all, define  
26 the universe of claims and defendants in the economic loss class actions. As a  
27 practical matter, the MCC probably will have that effect – even if it does not, by  
28 itself, operate to dismiss claims or defendants not asserted or named in the MCC –

1 because all class members' claims likely will proceed to judgment in this MDL,  
2 whether by settlement or litigation, based on the Amended California Complaint,  
3 which tracks the MCC.

4 In the unlikely event the Court dismisses the claims asserted in the MCC (all  
5 of which, except for claims under the Magnuson–Moss Warranty Act, are state-law  
6 claims arising under California law) and any efforts to re-plead those claims fail,  
7 then plaintiffs will seek leave to amend the MCC to assert claims under other  
8 states' laws.<sup>1</sup> We believe plaintiffs' claims will survive motions to dismiss.

9 The next phase of motion practice will be class certification. If the Court  
10 certifies a nationwide class, then the claims of all class members who do not opt out  
11 will be merged and barred by the final judgment. The only potential claims, if any,  
12 that will remain are claims of individual plaintiffs who either opt out or fall outside  
13 the class definition. Such loose ends are inevitable, regardless of whether the MCC  
14 is deemed to dismiss claims and defendants as Toyota has proposed.

15 However, it is not a foregone conclusion that all class members' claims will  
16 proceed to judgment in the MDL. It is theoretically possible that at the conclusion  
17 of pretrial proceedings, the Court will remand underlying actions to their  
18 originating districts. Upon remand, plaintiffs in those actions might wish to  
19 prosecute claims they originally asserted before transfer but which were not  
20 litigated in the MDL because we chose not to assert them in the MCC. If such  
21 claims are deemed dismissed simply because they were not included in the MCC –  
22 even if such dismissal is “without prejudice” – then plaintiffs who wish to assert  
23 those claims post-remand will face obstacles that could prejudice their rights. Such  
24 plaintiffs arguably would not be entitled to amend their complaints as a matter of

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25 <sup>1</sup> We believe all named plaintiffs and class members can recover under California  
26 law. Unless and until the Court finds otherwise, it would be inefficient for the  
27 MCC to assert claims under other states' laws. In the MCC, plaintiffs specifically  
28 reserved the right to seek to re-plead under other states' laws to the extent deemed  
necessary based on the rulings of the Court. *See* MCC at 116 n.54 (Doc. 263).

1 right, and defendants almost certainly would oppose leave to amend. If they  
2 succeed in amending their pleadings, then plaintiffs would next face defenses of  
3 limitations, abandonment, waiver, and the like. Such plaintiffs potentially would  
4 suffer prejudice, and post-remand motion practice would burden transferor courts.

5 The scenario described above is, however, remote. The far more likely  
6 outcome is that all class members' claims will proceed to judgment in the MDL  
7 based on the Amended California Complaint, which tracks the MCC. If so,  
8 Toyota's concerns will be obviated because all claims will merge into and be barred  
9 by the final judgment, even if they were not asserted in the MCC. But we must  
10 anticipate contingencies that could prejudice the rights of plaintiffs if there is a  
11 §1407 remand, and are duty-bound to advocate an approach that protects plaintiffs  
12 without compromising judicial economy. Our proposal does exactly that.

## 13 **2. Purpose and Effect of the Amended California Complaint**

14 The Amended California Complaint amends the complaints in the underlying  
15 actions to which it relates (all of which originated in California) to mirror the  
16 factual allegations and legal claims asserted in the MCC. Plaintiffs intend for the  
17 Amended California Complaint to be the operative pleading at class certification in  
18 order to simplify the choice-of-law analysis.

19 If plaintiffs were to move for class certification based on the MCC, Toyota  
20 likely would urge the Court to treat all transferor fora as the multiple venues of this  
21 MDL litigation and apply the choice-of-law rules of all transferor fora.<sup>2</sup> See *In re*  
22 *Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 48 n.1, 49, 53–56 (D.N.J.  
23 2009) (plaintiffs moved for class certification based on the consolidated complaint;

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24 <sup>2</sup> In diversity cases, federal courts must apply the same choice-of-law rules that  
25 state courts in the same forum would apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*,  
26 313 U.S. 487 (1941). When an action has been transferred from one forum to  
27 another, the transferor forum's choice-of-law rules continue to govern. *Van Dusen*  
28 *v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).  
This rule applies to MDL transfers under §1407. See, e.g., *In re Plumbing Fixtures*  
*Litig.*, 342 F. Supp. 756, 758 (J.P.M.L. 1972).

1 court applied the choice-of-law rules of all transferor fora). Such a complex  
2 choice-of-law analysis would burden the Court and potentially complicate class  
3 certification for no good reason.

4 As Judge Fallon recognized in *Propulsid* and later in *Vioxx*, there is a  
5 perfectly sensible alternative approach that simplifies the choice-of-law analysis  
6 such that California's choice-of-law rules (and only those rules) apply to the claims  
7 asserted on behalf of the class: If plaintiffs move for class certification in actions  
8 originally filed in California, then the Court only needs to apply California's  
9 choice-of-law rules at class certification. See *In re Propulsid*, 208 F.R.D. at 142  
10 ("[T]he Court looks to the specific action brought before the Court for class  
11 certification, namely the Indiana complaint, to determine which state's choice-of-  
12 law rules apply."); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La.  
13 2006) ("[T]he Court will once again look to the specific action brought before it for  
14 class certification – the New Jersey complaint – and will apply New Jersey's  
15 choice-of-law rules . . .").<sup>3</sup>

16 Plaintiffs intend to move for class certification and proceed to trial in this  
17 District based on the Amended California Complaint, which amends and is the  
18 operative complaint for class actions originally filed in this District. If the MCC  
19 truly "supersedes" all underlying complaints, plaintiffs' ability to take the approach  
20 endorsed by Judge Fallon will be unnecessarily compromised.

### 21 **3. Conclusion**

22 It is respectfully submitted that the Court should enter Plaintiffs' Proposed  
23 Order Regarding the Effect of the MCC and Amended California Complaint, which  
24 is being lodged with the Court concurrently herewith.

25 <sup>3</sup> See also *In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 329 n.62  
26 (S.D.N.Y. 2005) (Kaplan, J.) ("Choice of law is a substantive issue touching the  
27 rights of the parties. Just as transfers pursuant to Sections 1404 and 1407 do not  
28 affect the applicable choice of law rules, so too the next step in the streamlining  
process – namely consolidation . . . – does not affect them.").

1 Dated: August 31, 2010

Respectfully submitted,

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